NO. 89-513

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

LLOYD B. FISHER,

Petitioner,

v.

JUDGE JAMES J. KRAJEWSKI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit Court of Appeals incorrectly relied upon F.R.A.P. 3(a) in stating its belief that it was appropriate to impose sanctions against Appellant and his counsel for their failure to strictly follow F.R.A.P. 10(b) and publicly reprimanding them by specifically naming them in the body of the Opinion and referring this case to the Indiana Disciplinary Board, without prior notice, and without a finding of bad faith, or a showing of prejudice to the Appellee in contravention of the law of other circuits and this Court.[1]

2. Whether the Seventh Circuit Court of Appeals approved a departure by the trial court from the accepted and usual course of judicial proceedings in determining that Appellant raised no objection to the trial court's Jury Instruction 24, when no transcript of the entire conference was made and when Appellant's claim in his Rule 59 motion, supporting memoranda, and on appeal was that the jury should have been provided with two sets of jury verdict forms, so that the jury could have decided, separately, his first claim regarding his December, 1985 discharge and his second claim regarding his October, 1987 constructive discharge.

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1 At least one (1) petition for certiorari involving this question is presently pending before this Court, to wit: L. Steven Platt v. U.S. Court of Appeals for the Seventh Cir., No. 88-1756.

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NO. _____

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Seventh Circuit (App. A., infra) denying Petitioner's Suggestion for Rehearing is not reported. The judgment and opinion of the United States Court of Appeals for the Seventh Circuit (App. B, infra) is not reported. The order of the District Court denying Petitioner's Motion For New Trial (Appx. C, infra) is not reported. The judgment of the United States District Court for the Northern District of Indiana, Hammond Division, (App. D, infra) is not reported.

JURISDICTION

The Order of the United States Court of

Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, was entered on May 2, 1989. The Order of the United States Court of Appeals denying the Petition for rehearing was entered on June 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, 5th Amendment, in its pertinent part, provides as follows:

> **"No person shall be . . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."**

RULES INVOLVED

F.R.A.P. 46(c), in its pertinent part states:

"(c) Disciplinary Power of the Court Over Attorneys. A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court."

F.R.A.P. 10(b), in its pertinent part, states:

"(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered.

(1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcripr or other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

F.R.A.P. 3(a), in its pertinent part, states:

> **Appeals as of Right - How Taken**
>
> **(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.**

STATEMENT OF THE CASE

This is an action instituted in the United States Federal Court for the Northern District Of Indiana, Hammond Division. The Plaintiff/Appellant, LLOYD B. FISHER, alleged that in December, 1985, the Defendant/Appellee, JUDGE JAMES J. KRAJEWSKI, fired him from his position as Public Defender in Lake County Court, Div. III, effective January 1, 1986, because of

his political association in violation of the First Amendment to the United States Constitution. The Defendant, Krajewski, a Republican, claimed that: (1) the Plaintiff was fired because of his association with the former Democratic Judge, Orval W. Anderson, a convicted felon; and (2) the Plaintiff served inadequately when he was asked to serve as Judge Pro Tempore.

Democrats Dave Nicholls and Steve Kurowski, two other Public Defenders, were discharged along with the Plaintiff in December 1985. All three were reinstated by the Defendant, Krajewski, on October 19, 1987. This was as a result of a judgment against Defendant Krajewski in a lawsuit filed by Public Defenders Nicholls and Kurowski and tried without a jury in September, 1987. Defendant Krajewski, then, constructively discharged all three

(3) public defenders, resulting in a contempt of court order as to Nicholls and Kurowski. (Kurowski et. al. v. Krajewski, 848 F.2d 767 (7th Cir. 1988) cert denied, 109 S.Ct. 309 (1988). The Plaintiff amended his complaint to add a claim that in October 1987, the Defendant, Krajewski, constructively discharged him, as well as Nicholls and Kurowski, in retaliation because of the pursuit by the Plaintiffs of their constitutiional rights by way of the District Court proceedings.

The jury, on February 10, 1988, returned a verdict in favor of the Appellee, JAMES J. KRAJEWSKI, and against the Appellant, LLOYD B. FISHER. (See Appx. D). A motion for a new trial was filed by the Plaintiff on February 22, 1988 and said motion was denied on March 31, 1988 (See Appx. C). Appellant appealed.

On May 2, 1989, the Seventh Circuit

Court of Appeals issued an opinion affirming the jury verdict and the magistrate's denial of the Appellant's motion for a new trial. (See Appx. B).

On appeal, the Appellant contended, inter alia, that the jury should have been given two (2) seperate sets of verdict forms: one (1) relating, to his January 1, 1986 discharge, and one (1) relating to his October 19, 1987 constructive discharge. The Appellant contends that the fact that he did not specifically object to Jury Instruction No. 24, which contained one set of jury verdict forms, allowing for one verdict in favor of the Appellee Krajewski or one verdict in fazvor of the Appellant Fisher, did not constitute a waiver of that objection. (See, Appx. E). Appellant/Plaintiff contended that his attorney's quiery "The jury verdicts, it will be two separate verdicts" indicates

that the court's attention was sufficiently called to the necessity for two such seperate jury verdict forms.

Further, the Appellate Court's Opinion indicated as follows:

> Furthermore, we believe that it is appropriate, pursuant to Fed. R. App. P. 3(a), to impose sanctions in the total amount of $1,500.00 to be borne in equal measure by the plaintiff/appellant Attorney Lloyd B. Fisher and each of his attorneys of record on appeal, Gilbert King, Jr. and Macarthur Drake, for their failure to submit any part of the transcript of the lower court proceedings; failure to file a certification showing that they did not intend to do so; failure to notify the Appellee of their intention not to file the transcript, all in violation of Fed. R. App. P. 10(b). In addition, we refer this case to the Indiana Disciplinary Board for investigation, review and any action they deem appropriate under the circumstances.

Id., at p. 22; Appx. B-22.

Appellant's Suggestion For Rehearing In Banc was filed June 2, 1989 and denied June 13, 1989. (See, Appx. A).

REASONS FOR GRANTING THE WRIT

A. THE SEVENTH CIRCUIT COURT OF APPEALS INCORRECTLY RELIED UPON F.R.A.P. 3(a) IN STATING ITS BELIEF THAT IT WAS APPRCPRIATE TO IMPOSE SANCTIONS AGAINST APPELLANT AND HIS COUNSEL FOR THEIR FAILURE TO STRICTLY FOLLOW F.R.A.P. 10(b) AND PUBLICLY REPRIMANDING THEM BY SPECIFICALLY NAMING THEN IN THE BODY OF THE OPINION AND REFERRING THIS CASE TO THE INDIANA DISCIPLINARY BOARD, WITHOUT PRIOR NOTICE, AND WITHOUT A FINDING OF BAD FAITH, OR A SHOWING OF PREJUDICE TO THE APPELLEE IN CONTRAVENTION OF THE LAW OF OTHER CIRCUITS AND THIS COURT.

This Petition For Writ of Certiorari is of exceptional importance because the Seventh Circuit Court of Appeals has departed so far from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision. Without any evidence of bad faith or undue prejudice to the Appellee, the appellate Court indicated that it was appropriate to impose sanctions in the total amount of $1,500.00, to be borne in equal measure by

the Appellant, an attorney, and each of his two attorneys of record, in addition to referring this case to the Indiana Disciplinary Board for investigation because Appellant failed to follow F.R.A.P. 10(b). As a basis for the suggested imposition of sanctions, the appellate court misapprehended F.R.A.P. 3(a) and its ruling conflicts with the applicable substantive standards for the imposition of sanctions as established by the Seventh Circuit, as well as other circuits and the United States Supreme Court, thereby establishing new precedent in the circuit which would seem to allow the imposition of sanctions on litigants and their counsel for a single rule. All of this was done without regard to the policy and procedure established by Fed. R. App. P. 46(c).

At page 5 of the Opinion, (Appx. B-5), the appellate court indicated:

Judge Krajewski, after filing the transcript, maintains that we should dismiss the appeal because the appellant failed to comply with Rule (10)b. While Rule 10 does speak of sanctions for violation ot its requirements, Fed. R. App. R. 3(a) states:

> Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate which may include dismissal of the appeal.

This rule, by its title, "Filing the Notice of Appeal", applies to the notice of appeal only. The rule sets forth those procedures an appellant must follow in order to transfer his case from a federal district court to a court of appeals. It specifically applies to the timeliness and contents of the notice.

Moreover, Fed. R. App. P. 3(a) has been given a liberal construction as it applies

to the notice of appeal in the Seventh Circuit, (See Scherer v. Kelly, 584 F.2d 170 at 174 (7th Cir. 1978). The literal intent and obvious purpose of this rule is to avoid the necessity for dismissing appeals on technical grounds when the court can reach a decision on the merits.
It is not intended to be a catchall provision for any transgression of the appellate rules.

The appellate court, in relying on Gulf Water Benefaction Co. v. Public Utility Commission, 674 F.2d 462 (5th Cir. 1982) and United States v. One Motor Yacht Named Mercury, 527 F.2d 1112 (1st Cir. 1975), erroneously concluded that pursuant to Fed. R. App. P. 3(a) an appeal may be dismissed for failure to comply with Rule 10(b). These cases are distinguishabvle from the one at bar. In each of those cases there was a local rule relative to a violation of

Fed. R. App. P. 10. In Gulf, supra, there was a bankruptcy rule 806 and in One Motor Yacht, supra, there was local rule 7. There is no such local rule in the Seventh Circuit.

In determining whether a case is an appropriate one for the imposition of sanctions, the Seventh Circuit traditionally looks for some indication of the appellant's "bad faith" suggesting that the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay or harassment or out of sheer obstinancy. Reid v. United States, 715 F.2d 1148 at 1155 (7th Cir. 1983). An even higher standard is used to support direct action against a party. Inryco, Inc. v. Metropolitan Engineering Co., Inc., 705 F2d 1225 (7th Cir. 1983).

Other circuits have looked for some

indication of "bad faith" prior to the imposition of sanctions. See, Acevedo v. Immigration & Naturalization Service, 538 F.2d 918 (2nd Cir. 1976); N.L.R.B. v. Smith & Wesson, 424 F.2d 1072 (1st Cir. 1970); Dawson v. Lennon, 799 F.2d 934 (11th Cir. 1986); American Watch Corp. v. Princess Ermine Jewels, 786 F.2d 1447 (9th Cir. 1986).

Similarly, this Court has consistently indicated that a finding of bad faith should precede sanctions of counsel. Roadway Exp., Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455 (1979).

Since there was no finding of bad faith as to the Appellant or his counsel, this diecision contradicts decisions in the Seventh Circuit, other circuits and this Court. Plaintiff was not even a counsel of record.

The federal appellate rules for

imposition of sanctions provide some fundamental Fifth Amendment constitutional guarantees not afforded Appellant and/or his attorneys in the instant case. Fed. R. App. P. 46(c) provides, in pertinent part, as follows:

> (c) Disciplinary Power of the Court Over Attorneys. A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorneys who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

Prior to the receipt of the Opinion herein, neither the Appellant nor his attorneys had any notice that they would be publicly reprimanded by their names being specified in the body of the Opinion. They did not have notice that this case would be referred to the Disciplinary Board for the State of Indiana, nor has there been an opportunity to show cause why these actions

should not be taken.

The Seventh Circuit Court of Appeals has issued a disproportionate number of sanctions in relation to the number of cases handled by that circuit. For example, since January 1, 1986, the Seventh Circuit Court of Appeals has imposed sanctions in 37 reported cases, more than any other circuit. During this same period of time, the Fifth Circuit had 24 sanctions cases and the Ninth Circuit had 22. However, the most astonishing fact is that both circuits handled twice as many appeals as the Seventh Circuit.[2]

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2 Caseload figures are drawn from Administrative Office of the U.S. Courts, Federal Court Management Statistics, 12, 16, 20 (1988). See, Petition in Platt, supra, at p. 20.

Yet Petitioner has been unable to find any other reported opinion in which a court of appeals has approved sanctions for an alleged violation of F.R.A.P. 10(b).

The misapplication of Fed. R. App. P. 3(a), and the publication of the belief that sanctions should be imposed, virtually public reprimand, without a finding of bad faith or an opportunity to be heard are clear violations of the rights guaranteed to litigants and their counsel by the Fifth Amendment. These violations warrant the granting of this Petition For Writ of Certiorari. This Court could then clarify the standards for the imposition of sanctions and the application of the appellate rules. Also, it could resolve the split in this regard among the circuits and any variance with the opinions of this Court.

B. THE SEVENTH CIRCUIT COURT OF APPEALS APPROVED A DEPARTURE BY THE TRIAL COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN DETERMINING APPELLANT RAISED NO OBJECTION TO THE TRIAL COURT'S JURY INSTRUCTION 24 WHEN NO TRANSCRIPT OF THE ENTIRE CONFERENCE WAS MADE AND WHEN APPELLANT'S CLAIM IN HIS RULE 59 MOTION, SUPPORTING MEMORANDA, AND ON APPEAL WAS THAT THE JURY SHOULD HAVE BEEN PROVIDED WITH TWO JURY VERDICT FORMS, SO THAT THE JURY COULD HAVE DECIDED, SEPARATELY, HIS FIRST CLAIM REGARDING HIS DECEMBER, 1985 DISCHARGE AND HIS SECOND CLAIM REGARDING HIS OCTOBER, 1987 CONSTRUCTIVE DISCHARGE.

There is a difference of opinion among the circuits as to the duty of the trial court to fully instruct the jury, as opposed to the duty of the litigant's counsel to object or offer curative instructions when the trial court does not fully instruct the jury.

The Ninth Circuit has held that a formal objection to a jury instruction is not necessarily required when the appellant has previously made his position sufficiently clear to the trial court.

See, Kramar v. Securities Gas and Oil, Inc., 671 F.2d 766, 769 (9th Cir. 1982); and Brown v. Avemco Inv. Corp., 603 F.2d 1367, 1375 (9th Cir. 1979).

The Third Circuit has followed these cases in holding that even if a plaintiff did not formally object to a jury instruction on a fundamental issue, it is appropriate for the Court of Appeals to consider the instruction in the context of the record on that issue. See, Bowley v. Stotler & Co., 751 F.2d 641, 647-648 (3rd Cir. 1985).

The Second Circuit has held that its trial court properly set aside a jury verdict on the ground that the jury had received inadequate instructions, although not objected to, on a fundamental issue causing substantial injustice. See, Baskin v. Hawley, 847, F.2d 1120, 1134 (2nd Cir. 1986).

In the instant case, the record of the Court of Appeals and of the District Court clearly show that Appellant/Plaintiff filed two separate and distinct claims of First Amendment rights violations. In fact, on page 11 of Defendant Krajewski's Memorandum, filed February 29, 1988, opposing Plaintiff's Rule 59 Motion for a new trial, Defendant states:

> **"Indeed, as a result of the instruction conference Court's instruction 18 was modified to make it clear that there were two separate issues of fact based upon two separate legal claims."**

(Deft.'s Memo. In Opp. to New Trial, Appellant's Appellate Court Appx. 20, p. 146). Thus, each discharge had been clearly raised and each constituted a fundamental issue requiring the central focus of the jury and the jury instructions. Apparently, the Court of Appeals misapprehended that there was an unrecorded jury instruction conference. It concluded

in its Opinion that:

> The appellant failed to object to the court's instruction number 24. However, the appellant's counsel queried the magistrate: "The jury verdicts, it will be two separate verdicts?" to which the magistrate responded affirmatively.
>
> Judge Krajewski contends on appeal that the appellant waived the right to object to the verdict form on appeal because he failed to object in the trial court. We agree. The appellant failed to object to instruction 24, and it contains "two separate verdicts." as his query sought to confirm. Thus, his question to the magistrate does not even suggest he was in disagreement with the verdict from contained in the instruction. Nor did the appellant ever clearly explain to the magistrate that he wanted separate verdict forms relating to his January 1, 1986, discharge and his alleged constructive discharge of October 19, 1987, and he failed to submit any such proposed verdict form.

Krajewski II, supra, Slip Op. at pg. 20; Appx. B-20.

Nothing in the transcribed jury instruction discussion makes mention of the modification of Court Instruction 18.

(See, Trial Trscp. Vol. III, pgs. 375-379.) Thus, the modification of Court Instruction 18 could have only occurred off the record. Apparently, the trial court did not take into account this off-the-record jury instruction conference in its order denying Plaintiff's motion for a new trial. Burlington Northern R. Co. v. B.M.W.E., 793 F.2d 792 (6th Cir. 1986)

Although, Appellant believed the entire trial transcript was not necessary on appeal, due to the trial court's detailed order denying his Motion for New Trial, the transcript is revealing on this point.

What the trial transcript reveals is further evidence that the entire jury instruction conference was not transcribed. At the end of the second trial day, the transcript indicates that all the evidence was in, the jury was recessed overnight and counsel for the

parties were to meet with the court for a discussion prior to the jury recommencing at 9:30 the following morning. (Trial Transcript, Vol. II, pgs. 371-372).

The beginning of the transcript of proceedings for the third day states as follows:

> **THE COURT: Okay. After discussing the instructions with the attorneys on behalf of the plaintiff, who wants to speak? Mr. Drake, Mr. King, do you have any objections to the wording of any of the instructions that I have indicated that I will give, Instructions 1 through 25?**

(Tr. Trcpt., Vol. III, pg. 375).

Clearly, the District Court's ". . . discussing the instructions with the attorneys . . .", as referred to above, took place outside the transcribed record. Thus, not all of the jury instruction conference was transcribed, contrary to the apprehension of the Court of Appeals.

Under these circumstances, the Court of

Appeals should have been set on an inquiry of the trial record as a whole to determine if seperate verdict forms for each of the two (2) alleged wrongful discharges were required. See, Alloy Intern. Co. v. Hoover-NSK Bearing Co., 635 F2d 1222 (7th Cir. 1980); and B.M.V.E., supra.

Even if the "seperate verdicts" reference by Plaintiff's counsel was not sufficient as an objection or request for modification of Court Instruction No. 24, the error in omitting seperate verdict forms for each discharge was so plain and the injustice so obvious that it warrants reversal by this Court. City of Newport v. Fact Concerts, Inc, 101 S.Ct. 2748 (1981).

However, Plaintiff contends that his "separate verdicts" reference was sufficient notice to the trial court, given the context, to preserve the issue on appeal.

The context within which Plaintiff's counsel asked the Magistrate about the "two separate verdicts," and the Magistrate's answer makes it clear that counsel's inquiry sought confirmation of a prior understanding. The question and answer came at the end of the Magistrate's transcribed request for objections to Court Instructions 1-25, which had already been discussed with counsel for both parties, as illustrated above. The transcription reads as follows:

. . . .

> THE COURT: Any other instructions in 1 through 25 that you have an objection to?
>
> MR. KING: I think that -- that -- just one other point, Your Honor. The jury verdicts, it will be two separate verdicts?
>
> THE COURT: That is correct.
>
> MR. KING: Okay. We won't -- that's the substance of our objection to the instructions that the Court has indicated it will instruct the jury.

(Tr. Trscp., Vol. III, pg. 376).

Clearly, the reason for this part of the proceeding was to record differences that had not been worked out between the court and the parties' counsel at the earlier "instruction conference." Thus, the affirmative response to the question about "two separate verdicts" would leave Plaintiff's counsel with the impression that there was no further objection, modification or instruction proposal to be made. This was sufficient to alert the court of Plaintiff's objection to the Court's Instruction No. 24 as it was originally proposed.

Where, as here, a single set of instructions fails to convey correct guidance to the jury as to two seperate claims, the single set of instructions constitute reversible error.

Also, if a review of the charge, as a

whole, leaves the reviewing court with substantial and ineradicable doubt as to whether the jury has been properly guided in its deliberations, then the jury's verdict cannot stand. Martin v. City of New Orleans, 678 F2d 1321, 1325 (5th Cir. 1982). In Pryor v. Gulf Oil Corp., 704 F2d 1366 (5th Cir. 1983), that court reversed a district court case where a gneral jury verdict form was submitted to the jury which had at least two central issues to decide. Requests for separate verdict forms for each central issue were not necessary to preserve the error in that case.

Likewise, in the instant case, the only inference available to the jury from the single set of verdict forms the District Court provided is that: (a) Defendant was guilty each of the two (2) times Plaintiff was discharged; or (b) Defendant was

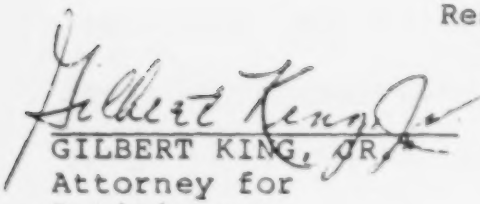
innocent each of those times. This all or none limitation precluded the jury, in its verdict, from distinguishing the first discharge from the second.

III.

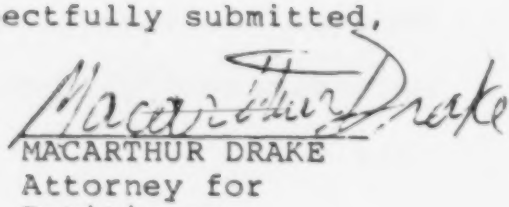
CONCLUSION

For all of the above reasons, the Petition for Writ of Certiorari should be granted and Judgment and Order of the Court of Appeals should be reversed.

Respectfully submitted,



GILBERT KING, JR.
Attorney for
Petitioners



MACARTHUR DRAKE
Attorney for
Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

June 13, 1989.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

LLOYD B. FISHER, Plaintiff-Appellant,	) Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
NO. 87-1827 vs.	)
JUDGE JAMES J. KRAJEWSKI, Defendant-Appellee.	) No. 86 C 882 Andrew P. Rodovich Magistrate

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing in banc filed by counsel for Plaintiff-Appellant, no judge in active

service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, DENIED.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-1827

LLOYD B. FISHER,

Plaintiff-Appellant,

v.

JUDGE JAMES J. KRAJEWSKI,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. 86 C 882—Andrew P. Rodovich, *Magistrate.*

ARGUED DECEMBER 9, 1988—DECIDED MAY 2, 1989

Before CUMMINGS, COFFEY, MANION, *Circuit Judges.*

COFFEY, *Circuit Judge.* On January 1, 1986, Judge James J. Krajewski discharged the appellant Lloyd Fisher from his position as an assistant public defender in Lake County, Indiana, prompting Fisher to file a lawsuit under the United States Constitution and 42 U.S.C. § 1983. Fisher appeals the jury verdict and the denial of his motion for a new trial. We affirm.

In June 1985 the defendant/appellee Krajewski, a Republican, was appointed to fill a vacancy in the Lake County (Indiana) Court, Division III, after the resignation of Judge Orval W. Anderson, a Democrat. On or about December 12, 1985, Judge Krajewski informed Lake

County assistant public defenders Steve Kurowski, Dave Nicholls and Lloyd Fisher, all of whom were Democratic appointees of Anderson, that they would be terminated effective January 1, 1986.

Subsequent to their termination Kurowski and Nicholls filed suit against Judge Krajewski in the United States District Court for the Northern District of Indiana, contending their discharge was politically motivated in violation of their first amendment right to freedom of speech. Lloyd Fisher, the plaintiff/appellant in this action, did not join in that suit.[1]

The parties in *Krajewski I* consented to a final disposition before a magistrate pursuant to 28 U.S.C. § 636(c). Magistrate Andrew P. Rodovich presided over the trial dealing with the question of whether Judge Krajewski terminated Kurowski and Nicholls because of their politics, and ruled in their favor.[2] In October 1987 Judge Krajewski reinstated Nicholls and Kurowski, as well as Lloyd Fisher, to their former positions as assistant Lake County, Indiana public defenders and directed them to report to work on October 19, 1987, at 8:30 a.m.

On that day, Judge Krajewski issued a "Memorandum" containing a "description of the job of public defender, Lake County Court, Division III" and various employment rules (relating, for example, to office hours, length of coffee breaks and work assignments), copies of which were provided to Fisher, Kurowski and Nicholls. The same day, Judge Krajewski issued a "rider" to the above memorandum informing Fisher, Kurowski and Nicholls "that pursuant to the employment rules as listed that your first notice of being late has been filed because of your late arrival on October 19, 1987." Judge Krajewski issued a

[1] We will hereafter refer to the Kurowski and Nicholls lawsuit as *Krajewski I*.

[2] The magistrate's decision was later affirmed by this court in *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir.), *cert. denied*, 109 S. Ct. 309 (1988).

second memorandum the same day, notifying the three public defenders of "a second violation of the employee rules of the Lake County Court" because they had changed their work assignments without the Judge's prior approval, and imposed a one-week suspension for the rule violations. In a letter dated October 28, 1987, Fisher informed Judge Krajewski as follows: "Due to the current hostile, intolerable and retaliatory working conditions existing in and around your courtroom, I am constrained, upon the advice of counsel, to decline your invitation to return to work there on Thursday, October 29, 1987, or at any time thereafter until further notice."

Following their October 19, 1987, suspension, Kurowski and Nicholls filed a petition in the district court seeking a contempt citation against Judge Krajewski for violation of the magistrate's *Krajewski I* reinstatement order. After hearing testimony on November 4, 1987, Magistrate Rodovich made certified findings of fact, pursuant to 28 U.S.C. § 636(e), to district judge James Moody relating to the events of October 19, 1987. The magistrate found that Nicholls and Kurowski were not late for work on October 19 and that the written public defender employment rules issued that day were designed "to harass and possibly trap [Kurowski and Nicholls] and give the defendant a reason to discipline [them]." The district judge concluded that the magistrate's findings of fact were proper and found Judge Krajewski in contempt of court for "disobedience or resistance to [a] lawful order . . . ." 28 U.S.C. § 636(e)(1).

Fisher filed his lawsuit in the United States District Court for the Northern District of Indiana, alleging that he was discharged on January 1, 1986, because he was a Democrat and Judge Krajewski was interested in appointing a Republican to the position. Shortly before trial Fisher amended his complaint, adding a claim that Judge Krajewski imposed discriminatory terms and conditions on his employment following his reinstatement on October 19, 1987. Fisher and Judge Krajewski consented to trial before Magistrate Rodovich. The case was tried before a jury, and the jury returned a verdict in favor of the defendant/appellee Krajewski.

On appeal, Fisher argues that the magistrate erred in barring any reference during trial to the findings of fact made in *Krajewski I* and during Judge Krajewski's contempt hearing relating to his October 19, 1987, conduct. He also alleges errors in the magistrate's jury instructions and further contends that two separate verdicts should have been presented to the jury, reflecting the two counts in his amended complaint, one asking whether Fisher's January 1, 1986, discharge violated his first amendment rights and the other asking whether he was constructively discharged on October 19, 1987.

Initially we point out that the plaintiff/appellant, Attorney Lloyd B. Fisher, failed to submit any part of the transcript of the lower court proceedings; failed to file a certificate stating that he did not intend to do so; failed to file a statement of the issues presented for review and further failed to notify the appellee of his intention not to file a transcript, all in violation of Fed. R. App. P. 10(b). Fed. R. App. P. 10(b) provides:

> **"(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered.**
>
> (1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. . . . If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.
>
> (2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.
>
> (3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (b) (1) of this Rule 10, file a statement of the issues

> the appellant intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. . . ."

Fisher's counsel attempted to explain at oral argument that the transcript was unnecessary to decide the issues presented on review. We disagree. In the absence of the transcript or an agreed, certified statement of facts (see Fed. R. App. P. 10(d)) it is impossible to review the trial court's rulings, particularly the magistrate's bench ruling excluding findings of fact and credibility determinations made in *Krajewski I* and during Judge Krajewski's contempt hearing. Fortunately, the appellee Judge Krajewski ordered and filed a complete transcript of the lower court proceedings, realizing, as we do, that the transcript is required for meaningful review.

Judge Krajewski, after filing the transcript, maintains that we should dismiss the appeal because the appellant failed to comply with Rule 10(b). While Rule 10 does not speak of sanctions for violation of its requirements, Fed. R. App. P. 3(a) states:

> "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal."

It is obvious that an appellate court has no alternative but to dismiss an appeal if the absence of the transcript precludes meaningful review. Confronted with this situation, several courts of appeal have decided that the failure to file a transcript of the lower court proceedings warrants dismissal of the appeal. *Thomas v. Computax Corp.*, 631 F.2d 139, 143 (9th Cir. 1980); *Southwest Admin., Inc. v. Lopez*, 781 F.2d 1378, 1380 (9th Cir. 1986); *Brattrud v. Town of Exline*, 628 F.2d 1098, 1099 (8th Cir. 1980); *Abood v. Block*, 752 F.2d 548, 550 (11th Cir. 1985). *See also In re Plankinton Bldg. Co.*, 133 F.2d 900 (7th Cir. 1943) (dismissing an appeal because the appellant failed to fulfill the requirements of former Fed. R. Civ. P. 75,

the predecessor to Fed. R. App. P. 10.) Two other circuits, while acknowledging their authority to dismiss the appeals, have decided cases on the merits to the extent it is practical and possible in the absence of a transcript. *Gulf Water Benefaction Co. v. Public Utility Comm'n*, 674 F.2d 462, 466 (5th Cir. 1982); *United States v. One Motor Yacht Named Mercury*, 527 F.2d 1112, 1113 (1st Cir. 1975).

It is plain under Fed. R. App. P. 3(a) and the cases cited above that an appeal may be dismissed for failure to comply with Rule 10(b). However, in each of the cases referred to a judgment of dismissal was entered because the courts were unable to engage in meaningful review of the lower court proceedings based on the lack of a record before them. That is not the situation here, as the appellee properly took it upon himself at his own expense and filed the transcript. Thus, meaningful review is possible, and we reach the merits in this case—although, as we will discuss, we are troubled by the plaintiff-appellant Attorney Lloyd B. Fisher's, as well as his attorneys' lack of respect in failing to comply with the rules of the court in neglecting to file a transcript they well knew or should have realized was necessary for the proper adjudication of the issues presented and in order that the justice system they took an oath to uphold and respect might operate properly.

EVIDENCE OF THE DECISION RENDERED IN *KRAJEWSKI I* AND OF THE CONTEMPT CITATION

Initially, the appellant challenges the magistrate's ruling excluding evidence of Judge Krajewski's contempt citation for his treatment of the *Krajewski I* plaintiffs after their October 19, 1987, reinstatement. He also contends that the jury should have been informed that the magistrate had previously ruled against Judge Krajewski in *Krajewski I*. Approximately one week prior to trial, the appellee Judge Krajewski filed a motion in limine

seeking exclusion of evidence of his contempt citation and of the hearings and orders pertaining thereto, and further requesting "that there be no reference to the decision in cause no. H 86-586 [*Krajewski I*]," on the grounds that the evidence was irrelevant and likely to confuse and prejudice the jurors.[3] On the day the trial commenced, the appellant filed a motion captioned "Motion Requesting This Court Take Judicial Notice of its Orders and Findings in [*Krajewski I*]," asking that the court conclude as a matter of law, based on *Krajewski I*, that Judge Krajewski was entitled to neither absolute nor qualified immunity; and that the appellant's public defender position was neither a confidential nor a policymaking position and therefore the appellant could not be discharged for political reasons. *See Branti v. Finkel*, 445 U.S. 507, 517-20 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). The appellant also requested that the court rule as a matter of law, based on findings of fact made in connection with the contempt proceeding, that Judge Krajewski discriminated against Fisher in the terms and conditions of his employment following his reinstatement on October 19, 1987.

Ruling from the bench, the magistrate granted the appellant's motion in part.[4] However, the magistrate denied

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[3] The motion sought exclusion of Magistrate Rodovich's decision in *Krajewski I*, not this court's affirmance, the motion having been filed on February 2, 1988, four months prior to our June 2, 1988, decision in *Kurowski v. Krajewski*, 848 F.2d 767.

[4] Specifically, the magistrate ruled as a matter of law that the appellant did not hold a policymaking position and therefore could not be discharged for political reasons, stating:

> "Although there has not been a motion for summary judgment filed in this case, I will apply the same law in this case as I have applied in the Nicholls and Kurowski case. In other words, I already have ruled as a matter of law that I will incorporate the orders in the previous case that the position of public defender is not a quote, policy making position, or a confidential position or a position whose political affiliation is needed for the effective performance of the job as those words are used in the various cases.

(Footnote continued on following page)

that part of the motion asking that the court "take judicial notice" of Judge Krajewski's contempt citation and of the decision in *Krajewski I*, explaining that doing so would usurp and interfere with the jury's freedom "to assess the credibility of each and every witness and to determine whether or not there was a political firing in this case . . . . This entire dispute is up to the jury to decide one way or the other." The magistrate therefore granted Judge Krajewski's motion *in limine* excluding reference to the previous *Krajewski I* decisions. On appeal, Fisher urges that evidence of the contempt citation and the decision in *Krajewski I* should have been admitted because it is highly probative of the defendant/appellee's motives with respect to Fisher's January 1, 1986, discharge and the alleged constructive discharge of October 19, 1987.[5] We will reverse a district court's decision to exclude evidence only upon demonstration of an abuse of discretion, *Schultz v. Thomas*, 832 F.2d 108, 110 (7th Cir. 1987).

The magistrate ruled that the jury should not be informed that he had previously ruled against Judge Krajewski in *Krajewski I* or that Judge Krajewski had been found to be in contempt of court for his treatment of the *Krajewski I* plaintiffs on the theory that the evidence would undermine the jury's role as factfinder in Fisher's suit. He explained:

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[4] *continued*

> So the only issue in this case is the motivation of Judge Krajewski at the time that this was—this decision was made."

Though the magistrate's ruling on the appellant's motion does not refer to Judge Krajewski's entitlement to absolute or qualified immunity, he had previously denied Judge Krajewski's motion to dismiss Fisher's lawsuit on those grounds.

[5] As noted *supra* p. 5, it is impossible to review the magistrate's ruling in the absence of the transcript, as we would be left to speculate as to the magistrate's reasoning in excluding evidence of the findings in the previous *Krajewski I* proceedings.

"There was the question as to my decision in the Nicholls and Kurowski case. I will grant the defendant's motion in limine in that respect.

In other words, these are two separate cases with two separate finders of facts. As in every case presented, there is the—always the possibility that the finder of fact will choose to judge the credibility differently than I did.

So I will grant the motion in limine to exclude any reference to the fact that on a previous occasion that I ruled in favor of the plaintiffs, Nicholls and Kurowski, and against the defendant, Judge Krajewski. In other words, this jury is free to assess the credibility of each and every witness and to determine whether or not there was a political firing in this case.

I also will grant the motion in limine as to the contempt citation that was presented to me; my recommendation to Judge Moody in that; Judge Moody's accepting the recommendation and imposing sanctions. I do not believe that that is a matter that can come in by way of impeachment or any other matter.

* * *

So, you know, our legal system is not perfect and I have seen numerous cases, for example, where two criminal defendants are tried separately and one winds up being found guilty and the other winds up being found not guilty and both convictions certainly have to be affirmed or both jury verdicts certainly have to be affirmed and this is the same case.

If this jury chooses to find in favor of the plaintiffs, that's their prerogative. If they choose to find in favor of the defendant, that is the jury's prerogative. But any prior rulings that I have made, any prior findings of facts that I have made are not res judicata in these proceedings. This entire dispute is up to the jury to decide one way or the other."

The plaintiffs in *Krajewski I* alleged that Judge Krajewski discharged them effective January 1, 1986, because of their political affiliation. Acting as trier of fact, the magistrate "had to choose between competing stories" regarding Judge Krajewski's motive in discharging the plaintiffs and "[had] to decide who to believe." *Kurowski v. Krajewski*, 848 F.2d at 771. Thus, in reaching his decision in *Krajewski I* the magistrate made a number of credibility determinations and rejected Judge Krajewski's testimony positing a lawful basis for the plaintiffs' discharge. *See id.* In this lawsuit Lloyd Fisher (like the plaintiffs in *Krajewski I*) alleged that Judge Krajewski discharged him effective January 1, 1986, for political reasons. The jury in this case (like the magistrate in *Krajewski I*) was called upon to determine the credibility of Judge Krajewski's testimony concerning whether or not the discharge was politically motivated.

Similarly, the contempt citation turned on the credibility of witnesses relating the events of October 19, 1987. We do not have the transcript of the contempt hearing, but Judge Krajewski stated during his deposition in this lawsuit that the magistrate found at the conclusion of the contempt hearing that Kurowski and Nicholls were not late for work on October 19, 1987, that there were no written public defender rules prior to that date and further, the rules were designed to harass the public defenders. The jury in this case also heard testimony concerning the events of October 19, 1987, and had to determine whether the public defender rules were promulgated and applied to the appellant Fisher in a discriminatory fashion, in order to decide Fisher's claim of constructive discharge. It is plain that the roles of the factfinders in *Krajewski I*, the contempt proceeding and this case overlapped to a significant extent.

We were confronted with a similar situation in *Schultz v. Thomas*, 832 F.2d 108 (7th Cir. 1987). In that case, the plaintiff filed a civil rights action against two Racine, Wisconsin, police officers alleging false arrest and excessive use of force in connection with plaintiff's arrest for disor-

derly conduct. The plaintiff had previously been acquitted of the disorderly conduct charge after a trial to the court, and the trial judge found that the police officers' testimony was not credible. The circuit court trial judge was allowed to testify in a subsequent civil rights action to the findings of fact and conclusions of law contained in his opinion on the state charge, and a transcript of the judge's opinion was also admitted in evidence. We disagreed with the judge's ruling in the civil rights case in allowing the original trial judge to testify and remanded that case for a new trial, holding that "[the judge's] testimony was irrelevant and tended to usurp the jury's function in assessing the credibility of testifying witnesses." 832 F.2d at 111. We explained our holding as follows:

> "Obviously, the occurrence upon which Judge Flynn decided the disorderly conduct charge was the same as that placed before the civil rights jury. In determining whether the defendants violated Schultz's civil rights by falsely arresting him and then giving willfully false testimony in order to secure his conviction, the jury was required to observe and listen to many of the same witnesses giving the identical testimony as that which formed the basis for Judge Flynn's disorderly conduct decision. Indeed, the aforequoted excerpts from Judge Flynn's opinion so unavoidably overlapped the jury's role in assessing the credibility of the key witness as to unfairly prejudice the defendants by denying them the right to have a jury decide the facts which formed the claims against them. *See Wilmington v. J. I. Case Co.*, 793 F.2d 909, 919 (8th Cir. 1986) (upholding a district court's refusal to admit the text of an arbitration decision because it would 'either usurp the jury's role in assessing credibility or would be unfairly prejudicial')."

832 F.2d at 110-11. As in *Schultz*, evidence underlying Judge Krajewski's contempt citation and the magistrate's decision in *Krajewski I* was the same as the evidence placed before the jury in Fisher's lawsuit. Because we are confident that admission of this evidence would usurp

the jury's freedom "to assess the credibility of each and every witness and to determine whether or not there was a political firing in this case," and would unfairly prejudice Judge Krajewski in denying him the right to have a fair and impartial jury decide the facts, we hold that the magistrate did not abuse his discretion in excluding the evidence.[6]

COURT'S INSTRUCTIONS 15, 16 AND 17

Fisher claims that the magistrate erred in giving the court's instructions 15, 16 and 17. The court's instruction 15 states:

> "You are instructed that evidence that political considerations were, in general terms, important to the defendant and that the defendant was displeased with the plaintiff because of his political affiliation is not sufficient evidence to meet the plaintiff's burden of proof. Evidence that others were hired for purely political reasons also is not sufficient by itself to meet the plaintiff's burden. The plaintiff must establish that his political affiliation was a motivating or substantial factor in the decision to terminate his employment."

[6] We find no merit to the appellant's claim that the magistrate's ruling limited Fisher's ability to impeach Judge Krajewski based on his testimony or admissions during *Krajewski I* or the contempt proceedings. The appellant has failed to cite, and we have been unable to find, any portion of the transcript or record supporting his contention that the magistrate precluded use of admissions or inconsistent statements made during the previous proceedings. Moreover, the issue is moot as the appellant has also failed to identify any adverse admissions or inconsistent statements made in the prior proceedings. Therefore, this argument also fails to convince us that the magistrate abused his discretion in excluding evidence of the contempt citation and the decision in *Krajewski I*.

The court's instruction 16 states:

> "You are also instructed that to the extent that the defendant as an employer lacked confidence in the public defenders that he had inherited from the prior administration for some reason other than their political affiliation, he was free to discharge them."

The court's instruction 17 states:

> "You are instructed that the plaintiff was an employee at will, which means that the plaintiff had no legitimate claim of entitlement to continued employment as a public defender and could be terminated for any reason or no reason, but he could not be terminated for exercising a constitutionally protected right."

We review a challenge to a jury instruction "both in the context of the other instructions given and in light of the allegations of the complaint, opening and closing arguments and the evidence of record." *General Leaseways v. National Truck Leasing Ass'n*, 830 F.2d 716, 725 (7th Cir. 1987). This inquiry must be undertaken " 'in a common sense manner, avoiding fastidiousness, [and] inquiring whether the correct message was conveyed to the jury reasonably well.' " *General Leaseways*, 830 F.2d at 725 (quoting *Wilk v. American Medical Ass'n*, 719 F.2d 207, 218 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984)).

The appellant does not take issue with the last sentence of instruction 15: "The plaintiff must establish that his political affiliation was a motivating or substantial factor in the decision to terminate his employment." Nor does he challenge the court's instruction 13, which makes the same point. Instruction 13 reads:

> "Initially the burden is on the plaintiff to show that his conduct was constitutionally protected and that his conduct was a substantial or motivating factor in the defendant's actions toward him. If you find that the plaintiff has met this burden, then the defendant has the burden to establish by a preponderance of

> the evidence that he would have reached the same decision as to the plaintiff's employment even in the absence of the protected conduct."

Both the last sentence in instruction 15 and all of instruction 13 are derived from *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977). This court has held that the *Mt. Healthy* analysis applies where there is a dispute, as in this case, regarding an employer's motivation in discharging an employee. *Wren v. Jones*, 635 F.2d 1277, 1286 (7th Cir. 1980), *cert. denied*, 454 U.S. 382 (1981); *Nekolny v. Painter*, 653 F.2d 1164, 1167 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982).

The appellant argues that the first two sentences in instruction 15 added to his initial burden of demonstrating that politics was a motivating factor in his discharge, in suggesting that he also had to prove that political considerations were important to Judge Krajewski or that Judge Krajewski was displeased with Fisher's political affiliation. We disagree. Instruction 15 did not modify Fisher's burden of proving that politics was a substantial or motivating factor in his discharge, rather it explained to the jury that Fisher could not satisfy his burden merely by demonstrating that Judge Krajewski was "displeased" that Fisher is a Democrat or that Fisher's political affiliation was "important" to Judge Krajewski. That explanation of the meaning of the phrase "substantial and motivating factor" reflects our observation in *McClure v. Cywinski*, 686 F.2d 541, 545 (7th Cir. 1982), that a plaintiff cannot establish that politics is a motivating or substantial factor in his discharge simply by alleging that politics is important to the employer or that the employer is not wholly satisfied with the employee. *See also Nekolny v. Painter*, 653 F.2d at 1168. Therefore, instruction 15 was proper.

The appellant also alleges that instruction 16 incorrectly advised the jury that a public defender may be discharged simply because his employer "lacks confidence" in him. However, instruction 16 was lifted virtually verba-

tim from the Supreme Court's majority opinion in *Branti v. Finkel*, 445 U.S. 507, 520 n. 14 (1980), a case invoiving the discharge of a competent assistant public defender because of his political beliefs, and is a proper statement of the law. Moreover, Judge Krajewski's testimony supports a finding that he "lacked confidence" in Fisher for reasons other than his political affiliation. Judge Krajewski testified that he terminated Fisher's employment, not because of his political affiliation, but to restore public respect for the Lake County court following the criminal convictions of former Judge Orval Anderson and the former chief public defender Lee Christakis (*see infra* p. 26). The same defense was presented in *Krajewski I*, and we explained there that "If Judge Krajewski in fact thought Kurowski and Nicholls [the two assistant public defenders discharged along with Fisher] a blot on the court's escutcheon, he could fire them, whether they were or not." 848 F.2d at 771. We also observed: "Since a public official may fire subordinates for a good, bad, or indifferent reason—any but an unconstitutional reason—the actual moral standards of Kurowski and Nicholls are irrelevant. *It was enough that he had lost confidence in them.*" *Id.* (emphasis added) (citation omitted). We agree that instruction 16 accurately reflects the law as recited in *Branti v. Finkel* and *Krajewski I*.

The transcript of the jury instruction conference before the magistrate reveals that the appellant raised no objection to the court's instruction 17. The law is clear in this circuit that an objection to a district court's proposed jury instruction is waived on appeal unless the appellant objected on the record in the district court and clearly stated the reasons for the objection. *See, e.g., United States v. Marrinson*, 832 F.2d 1465, 1473 (7th Cir. 1987). Having failed to object to instruction 17 in the district court, the appellant has waived the right to object on appeal.

FISHER'S INSTRUCTIONS B, C, C-1 AND D

The appellant also contends that the magistrate erred in failing to give the appellant's requested jury instruc-

tions B, C, C-1 and D. He argues that without these instructions the jury could not properly evaluate Judge Krajewski's defense that he discharged the appellant, not for political reasons, but because Fisher was tainted with the criminal convictions of former Lake County Judge Orval Anderson and former Lake County Chief Prosecutor Lee Christakis. Fisher's requested instruction B states:

> "The Defendant Judge Krajewski terminated the Plaintiff Lloyd B. Fisher because of his association with former Judge Orval Anderson.
>
> If you find that this association between Mr. Fisher and former Judge Orval Anderson is protected by the 1st Amendment to the United States Constitution; and if you further find that this conduct was a substantial or motivating factor in Judge Krajewski's decision to terminate his employment, then
>
> The Defendant James Krajewski must show by a preponderance of the evidence that he would have reached the same decision as to ther [sic] termination of Mr. Fisher even in [the] absence of the protected conduct."

The appellant maintains that he has a constitutional right of free association in the work place. Specifically, he claims a right of free association with former Judge Anderson and contends that instruction B properly advises the jury of that right. We have several problems with the appellant's argument. Initially, the first sentence of instruction B advises the jury that Judge Krajewski discharged the appellant "because of his association with former Judge Orval Anderson." That charge is an improper attempt to direct the jury to resolve the central issue in the case (the reason for the appellant's discharge) in a particular manner. Moreover, a fair reading of the appellant's complaint and amended complaint reveals that he failed to allege that he was discharged because of his "association" with former Judge Anderson. Instead, Fisher claimed his employment was terminated because of his political affiliation. Fisher's instruction B alters his

theory of the case and would have confused the jurors. Second, contrary to the appellant's contention, Judge Krajewski did not argue that he discharged the appellant because of his "association" with former Judge Anderson. Rather, Judge Krajewski testified that he discharged the appellant in response to public pressure to "clean up" the Lake County Court and to improve the public's perception of the court. He testified that there was a public perception "that the public defenders in conjunction with the judge had these scams like going on," in light of "what had happened previously with the judge [Anderson] and . . . the chief public defender having been indicted and convicted for criminal acts done while members of the court." He also said that Lloyd Fisher was part of the "old guard" that the public distrusted. Lastly, as we stated in *Krajewski I*, Judge Krajewski was at liberty to discharge the appellant if he believed the appellant's association with former Judge Anderson to be "a blot on the court's escutcheon." 848 F.2d at 771. For these reasons, we hold that the district court properly rejected the appellant's proposed instruction B.

Fisher's instruction C states:

> "You have heard evidence that:
>
> Plaintiff's association with the former Judge Orval Anderson was the reason for Plaintiff's discharge because of Defendant's desire to clean the Court following the resignation and conviction of Judge Orval Anderson, for activities which did not involve Plaintiff.
>
> The Plaintiff's freedom of association with Judge Orval Anderson in the work place is also an association protected by the First Amendment.
>
> If you find that Plaintiff's freedom to associate in the work place was infringed upon by his discharge, then you must determine whether the Government official's interest in furthering a legitimate goal in discharging Plaintiff was outweighed by Plaintiff's in-

terest in exercising his freedom of association in the work place.

If you find that Defendant did not have a legimate [sic] governmental interest in discharging Plaintiff or if you find that the Plaintiff's interest in exercising his freedom of association in the work place [sic], then you must find for the Plaintiff and against the Defendant."

Fisher's instruction C-1 is identical to instruction C above, except that language is added to the final paragraph. We set forth below the final paragraph of Fisher's instruction C-1, highlighting the added language:

"If you find that Defendant did not have a legimate [sic] governmental interest in discharging Plaintiff, or if you find that the Plaintiff's interest in exercising his freedom of association in the work place *outweighed Defendant's stated legitimate interest*, then you must find for the Plaintiff and against the Defendant. *If, however, you find that Defendant did have a legitimate governmental interest that outweighed Plaintiff's interest in exercising his freedom of association in the workplace, then you must determine whether or not Defendant had other means available to him to accomplish that objective that would have caused a lesser infringement on Plaintiff's First Amendment rights.*"

Instructions C and C-1 advise the jury to consider whether Judge Krajewski discharged the appellant because he exercised his "freedom to associate in the work place." However, as noted above, the appellant filed this suit claiming his employment was terminated because he exercised his constitutional right to be a Democrat, not because he "associated" with former Judge Anderson. The appellant's proffered instructions C and C-1, like his requested instruction B, contradict his theory of the case as presented in his pleadings and would have occasioned considerable juror confusion. Furthermore, instructions C and C-1 conflict with the court's instruction 13, to which

the appellant did not object, reciting the parties' respective burdens of proof under *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*. As previously noted, the *Mt. Healthy* analysis applies in this case, as there is a dispute regarding Judge Krajewski's motivation in discharging the appellant (*see supra* pp. 19-20). *Mt. Healthy* does not require the factfinder to determine whether the employer's interests outweigh the interests of the employee, as the appellant's proferred instructions C and C-1 advise. *See Wren v. Jones*, 635 F.2d 1277, 1286 (7th Cir. 1980), *cert. denied*, 454 U.S. 832 (1981). Therefore, instructions C and C-1 were properly rejected because they fail to state the law correctly, they contradict other approved jury instructions and would have confused the jury. Unfortunately, we cannot say that we are surprised by the inconsistencies and contradictions contained in the appellant's requested instructions, as the appellant's trial attorneys also filed this appeal—without a transcript of the district court proceedings.

The appellant's requested instruction D states:

> "If you find that Defendant has borne his burden of producing evidence of legitimate, non-political reasons for terminating Plaintiff, then you must determine whether Plaintiff has established that it is more likely than not that Defendant's stated reasons are pretextual, that is, not the real reasons for Plaintiff's termination.
>
> If you determine that Defendant's stated non-political reasons for Plaintiff's discharge were pretextual, then you must find for the Plaintiff and against Defendant."

The instruction, as submitted in the district court, cites as its source *Texas Dep't of Community Affairs v. Burdine*, 450 U.S.248 (1981), which established the allocation of burdens and order of proof in discrimination actions filed under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*). The instruction was inappropriate in this case, as Fisher did not allege a violation of Title VII.

SPECIAL VERDICT

The appellant also contends that the jury should have been given separate verdict forms relating, respectively, to his January 1, 1986, discharge and his alleged October 19, 1987, constructive discharge. The language of the verdict actually presented to the jury was contained in the court's jury instruction 24, stating:

> "The forms of verdict read as follows:
>
> 'We, the jury, find in favor of the defendant, James J. Krajewski, and against the plaintiff, Lloyd B. Fisher.'
>
> 'We, the jury, find in favor of the plaintiff, Lloyd B. Fisher, and against the defendant, James J. Krajewski, and assess actual damages in the amount of _____ Dollars and punitive damages in the amount of _____ Dollars.' "

Counsel for both parties were provided with copies of the court's proposed instructions 1-25 and were given the opportunity to object to them during a jury instruction conference. The appellant failed to object to the court's instruction number 24. However, the appellant's counsel queried the magistrate: "The jury verdicts, it will be two separate verdicts?" to which the magistrate responded affirmatively.

Judge Krajewski contends on appeal that the appellant waived the right to object to the verdict form on appeal because he failed to object in the trial court. We agree. The appellant failed to object to instruction 24, and it contains "two separate verdicts," as his query sought to confirm. Thus, his question to the magistrate does not even suggest he was in disagreement with the verdict form contained in the instruction. Nor did the appellant ever clearly explain to the magistrate that he wanted separate verdict forms relating to his January 1, 1986. discharge and his alleged constructive discharge of October 19, 1987, and he failed to submit any such proposed verdict form.

As noted above, the appellant failed to file a transcript of the proceedings before the magistrate, and also failed to comply with the other requirements of Fed. R. App. P. 10(b) (*see supra* p. 7). Contrary to the appellant's contention at oral argument, we could not have decided the issues presented in this appeal without the court transcript. The transcript of the jury instruction conference was certainly necessary in determining whether there had been a waiver of objection to the court's instruction 17 and to the form of verdict. In addition, the appellant, in his brief and oral argument, challenged the magistrate's bench ruling excluding findings of fact and credibility determinations made in *Krajewski I* and during Judge Krajewski's contempt hearing. It is impossible to properly review a ruling made during the course of trial without a transcript of the proceeding, particularly where, as here, the parties disagree as to the scope and the specific grounds for the ruling. In the absence of the transcript, we are left to speculate as to the reasoning the trial court employed in excluding the evidence at issue. This court will not render a judicial decision founded on speculation.

It goes without saying that we expect and are entitled to strict compliance with the appellate rules of procedure. The appellant's failure to comply with Rule 10(b) is particularly disturbing, as he is an attorney duly licensed to practice in Indiana, as well as admitted to practice before this court. In addition, he is represented by counsel on appeal, and their default and conduct would have prevented this court from engaging in meaningful review of all of the challenges to the lower court's rulings. Moreover, this is not a case where the appellant even attempted to conform to the rules but was unsuccessful with respect to timeliness or form. The record reveals no evidence that Fisher attempted to adhere to Rule 10(b), as he failed to file the transcript or perform any of the alternative acts set forth in the rule.

If, as the appellant's counsel contended during oral argument, the plaintiff/appellant could not afford the cost of transcribing all of the lower court proceedings, he had

three alternatives: he could have ordered the transcription of only the relevant portions of the record, as Fed. R. App. P. 10(b) permits, or filed an agreed, certified statement of facts pursuant to Fed. R. App. P. 10(d), or he could have sought authorization from the district court to appeal *in forma pauperis* under 28 U.S.C. § 1915(a) (*see Thomas v. Computax Corp.*, 631 F.2d at 143; *see also* Fed. R. App. P. 24).

Because it is the appellant's responsibility to file the transcript of the lower court proceeding, and the appellant failed to satisfy that obligation in this case, it is hereby ordered, pursuant to Fed. R. App. P. 39(e), that the costs of appeal shall include the cost incurred in the preparation of the transcript.

Furthermore, we believe that it is appropriate, pursuant to Fed. R. App. P. 3(a),[7] to impose sanctions in the total amount of $1,500.00 to be borne in equal measure by the plaintiff/appellant Attorney Lloyd B. Fisher and each of his attorneys of record on appeal, Gilbert King, Jr. and MacArthur Drake, for their failure to submit any part of the transcript of the lower court proceedings; failure to file a certification showing that they did not intend to do so; failure to file a statement of the issues presented for review; and failure to notify the appellee of their intention not to file the transcript, all in violation of Fed. R. App. P. 10(b). In addition, we refer this case to the Indiana Disciplinary Board for investigation, review and any action they deem appropriate under the circumstances.

The judgment on the jury's verdict and the magistrate's denial of the appellants' motion for a new trial are hereby AFFIRMED.

---

[7] Fed. R. App. P. 3(a) provides: "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal."

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APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

LLOYD B. FISHER, Plaintiff,	)	
v.	)	Civil No. H86-882
JUDGE JAMES J. KRAJEWSKI Defendant.	)	

O R D E R

This matter is before the court on a Motion for New Trial filed by the plaintiff, Lloyd B. Fisher (hereafter Fisher), on February 22, 1988. For the reasons set forth below, the motion is DENIED.

This motion arises out of a trial ending on February 10, 1988, in which the jury found in favor of the defendant, Judge James J. Krajewski (hereafter Krajewski) on all issues and claims. Fisher contends that the Court's Instructions 15, 16 and 17 were incorrect; that the Court committed

error in refusing to submit two separate verdict forms to the jury; that the Court erred in refusing to take judicial notice of a prior bench trial, Kurowski v. Krajewski, Civil No. H86-586, decided October 1, 1987, and contempt findings against Krajewski entered in that action; that the Court erred in granting Krajewski's motion in limine regarding evidence of the findins in Kurowski v. Krajewski; that the Court erred in refusing Fisher's proposed Instructions A through D, including C-1; and that the Court erred in refusing to permit Fisher to withdraw his jury demand.

Krajewski, however, contends that Fisher did not object to Instructions 15, 16 and 17 and has waived the right to do so; that in the alternative, the instructions were correct; that Fisher's proposed Instructions A through D, including

C-1 should be refused because they were not timely; that, in the alternative, InstructionA was covered by the Court's instructions; that instructions B through D were improper; that Fisher failed to object to use of one verdict form and has waived the right to do so; that it would have been improper for the Court to take judicial notice of the prior proceedings; and that Krajewski had a right to a jury trial.

Court's Instruction 15 provided:

> You are instructed that evidence that political considerations were, in general terms, important to the defendant and that the defendant was displeased with the plaintiff because of his political affiliation is not sufficiant evidence to meet the plaintiff's burden of proof. Evidence that others were hired for purely political reasons also is not sufficient to meet the plaintiff's burden. The plaintiff must establish that his political affiliation was a motivating or substantial factor in the decision to terminate his employment.

The instruction correctly states the burden of proof-the plaintiff must establish

that political affiliation was a substantial or motivating factor in the decision to terminate his employment. Mt. Healthy City School District Board of Education, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471, 484 (1977). The Seventh Circuit explained that this burden is not satisfied by showing "[t]hat politics was important to the defendant." McClure v. Cywinski, 686 F.2d 541, 545 (7th Cir. 1982). See Also Grossart v. Dinaso, 758 F.2d 1221, 1235 n.23 (7th Cir. 1985). In McClure, the court clearly held that:

> **This standard is not satisfied if the plaintiff shows only that elimination of the protected activity may have been welcomed by the defendant or even that such activity played some minor role in the discharge decision.**
>
> 686 F.2d at 546.

The instruction was proper.

Court's Instruction 16 provided:

> You are instructed that to the extent that the defendant as an employer lacked confidence in the public defenders that he had inherited from the prior administration for some reason other than their political affiliation, he was free to discharge them.

This instruction is a correct statement of the law, and there was evidence to support giving the instruction. Krajewski testified that Fisher had made mistakes when he sat as a judge pro tempore. Krajewski was justified in terminating Fisher if he lacked confidence in Fisher's abilities as a public defender, and the jury was entitled to an instruction to that effect.

The Court's Instruction 17 provided:

> You are instructed that the plaintiff was an employee at will, which means that the plaintiff had no legitimate claim to entitlement to continued employment as a public defender and could be terminated for any reason or no reason, but he could not be terminated for exercising a constitutionally protected right.

A review of the transcript reveals that Fisher did not object to this instruction and has waived the right to object at this stage in the proceedings. U.S. v. Marinson, 832 F.2d 1465, 1473 (7th Cir. 1987). Fisher was an employee at will, and the instruction correctly stated the Indiana employee at will doctrine and was the only such instruction given to the jury. Miller v. Review Board, 436 N.E.2d 804, 807 (Ind. App. 1982). As such, the instruction was proper.

Fisher did ask whether there would be separate verdict forms. The Court responded in the affirmative because there were two verdict forms: one in favor of the defendant on all claims and the other in favor of the plaintiff on all claims. Apparently, Fisher wanted one verdict form for the initial discharge effective January 1, 1986 and a second verdict for the October

19, 1987 incident. However, Fisher was provided with a copy of the Court's instructions including Court's Instruction 24 which in pertinent part provided:

> The forms of verdict read as follows:
>
> **"We, the jury, find in favor of the defendant, James J. Krajewski, and aainst the plaintiff, Lloyd B. Fisher."**
>
> **"We, the jury, find in favor of the plaintiff, Lloyd B. Fisher, and against the defendant, James J. Krajewski, and assess actual damages in the amount of _____Dollars and punitive damages in the amount of _____Dollars."**

Fisher did not object to Court's Instruction 24, and did not submit any proposed verdict forms or any special interrogatories. As such, Fisher has waived the right to object.

Fisher also claims that the Court erred in failing to take judicial notice of a prior bench trial, Kurowski v. Krajewski, Civil No. H 86-586. In the Kurowski trial,

the Court was the trier of fact. In this case, the jury was the trier of fact. If this Court had admitted the Kurowski decision into evidence or had taken judicial notice of the decision, it effectively would have usurped the jury's role in assessing the credibility of witnesses and determining the facts. It also sould have been unduly prejudicial. See Schultz v. Thomas, 832 F.2d 108, 110-111 (7th Cir. 1987); and Wilmington v. J.L. Case Co., 793 F.2d 909, 919 (8th Cir. 1986). That evidence properly was excluded.

Fisher also objects to the Court's failure to give plaintiff's proposed Instructions A th[r]ough D, including C-1. Instructions A and B address the Mt. Healthy standard and are covered by the Court's Instructions 13, 14, 15 and 18. Mt. Healthy, 429 U.S. at 287, 97 S.Ct. at 576, 50 L.Ed.2d at 484. See also

Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1308 (7th Cir. 1984). Instructions C and C-1 discuss Fisher's right to associate in the work place with former judge Orval Anderson. Fisher did not raise this claim in the Complaint or in the Pretrial Order. Fisher's claims were based on the right of political affiliation and the jury was instructed accordingly. Instruction B is based on Title VII. The shifting burden of production and pretext analysis are not applicable in a First Amendment political firing case.

Finally, Fisher contends that he should have been allowed to withdraw his jury demand. Federal Rule of Civil Procedure 38(d) provides that:

> **A demand for trial by jury made as herein provided may not be withdraw without the consent of the parties.**

Fisher had demanded a jury and both parties were entitled to a jury trial. That demand

could not be withdrawn without Krajewski's consent. Travelers Indemnity Co. v. State Farm Mutual Auto Insurance Co., 330 F.2d 250, 259 (9th Cir. 1964). Krajewski did not consent, and the case properly was submitted to the jury.

Based on the foregoing, the Motion for New Trial is **DENIED.**

ENTERED this 31st day of March, 1988.

/s/_____
Andrew P. Rodovich
United States Magistrate

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

LLOYD B. FISHER,	)	
	)	JUDGMENT IN A
	)	CIVIL CASE
v.	)	
	)	
JUDGE JAMES J. KRAJEWSKI Individually and in his capacity as Judge of the Lake County Court, Div. III	)	CASE NO. H86-882

Jury Verdict: This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the Defendant, Judge James J. Krajewski, and against the

Plaintiff, Lloyd B. Fisher.

It was ORDERED on June 8, 1987 that Defendant, The Board of Commissioners of County of Lake be DISMISSED.

It was ORDERED on November 10, 1987 that Defendant, Lake County Council be DISMISSED.

Date: February 10, 1988

Clerk: Richard E. Timmons

/s/_____

NOEL HERNANDEZ

Deputy Clerk

APPENDIX E

COURT'S INSTRUCTION NO. 24

Upon retiring to the jury room you should first select one of your number to act as your foreman who will preside over your deliberations and will be your spokesman here in court. Forms of verdict have been prepared for your convenience.

The forms of verdict read as follows:

"We, the jury, find in favor of the defendant, James J. Krajewski, and against the plaintiff, Lloyd B. Fisher."

"We, the jury, find in favor of the plaintiff, Lloyd B. Fisher, and against the defendant, James J. Krajewski, and assess actual damages in the amount of _____ Dollars and punitive damages in the amount of _____Dollars,"

You will take the verdict forms to the jury room and when you have reached

unanimous agreement as to your verdict, you will have your foreman select, fill in (if necessary, date, and sign the appropriate verdict form and then return to the courtroom.

IN THE

Supreme Court of the United States

October Term, 1989

No. 89-513

LLOYD B. FISHER,

Petitioner,

-vs-

JUDGE JAMES J. KRAJEWSKI,
Individually and in his Capacity as
Judge of the Lake County Court, Division III,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ISSUE PRESENTED FOR REVIEW

Whether failure to file a transcript of trial and then misrepresenting the facts to the Court of Appeals warrants sanctions.

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1989

No. 89-513

LLOYD B. FISHER,

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-VS-

JUDGE JAMES J. KRAJEWSKI,
Individually and in his Capacity as
Judge of the Lake County Court, Division III,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, Judge James J. Krajewski, Individually and in his capacity as Judge of the Lake County Court, Division III, respectfully prays this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), thereby refusing to review the decision entered by that Court in cause number 88-1827 on May 2, 1989.

OPINIONS BELOW

The proceedings in the District Court are unpublished and appear in the appendix to the Petition at page C-1.

The opinion of the Seventh Circuit is published at *Fisher v. Krajewski*, 873 F.2d 1057 (7th Cir. 1989), and is found in the Appendix to the Petition at page B-1. The order denying rehearing with suggestion for rehearing *en banc* is unpublished and is found in the Appendix at page A-1.

JURISDICTION

Petitioner Lloyd B. Fisher (hereafter Fisher) alleges jurisdiction in this Court pursuant to 28 U.S.C. §1254(1). The Petition was timely filed in this Court.

STATEMENT OF THE CASE

I. Nature of the Case

This Petition arises from an opinion of the Seventh Circuit affirming a judgment, entered on a jury verdict, in favor of a state court judge alleged to have terminated the employment of Fisher in violation of the First Amendment. It was claimed that the termination of employment was predicated upon the political affiliation of Fisher.

The precise issue addressed in this response arises from the opinion of the Seventh Circuit, in which that court found that Fisher and his counsel had violated the Federal Rules of Appellate Procedure and imposed sanctions upon both Fisher, an attorney, and his counsel.

II. Course of Proceedings Below

The complaint under authority of 42 U.S.C. §1983 was filed in the United States District Court for the Northern District of Indiana, Hammond Division (hereafter District Court), in 1986. All parties consented to trial before and entry of final judgment by a United States Magistrate.

Following dismissal of two original parties defendant, trial

was had to a jury in February, 1988. The jury returned a verdict in favor of Judge Krajewski, the sole remaining defendant.

Fisher initiated an appeal to the Seventh Circuit after first unsuccessfully seeking a new trial. The order denying the motion for new trial is found in the Appendix to the Petition at page C-1.

In the Seventh Circuit no record was filed by Fisher.

The Seventh Circuit affirmed the judgment of the District Court on May 2, 1989. *Fisher v. Krajewski*, 873 F.2d 1057 (7th Cir. 1989). In that opinion the Seventh Circuit, after affirming the District Court on the merits, determined that for violations of the Federal Rules of Appellate Procedure Fisher and his two counsel were to be sanctioned in the total amount of $1500.00, to be borne equally.

Fisher sought rehearing with a suggestion for rehearing *en banc*. That petition was denied June 13, 1989. Appendix, page A-1.

III. Statement of the Material Facts

Before turning to the facts directly related to the imposition of sanctions, a brief discussion of the facts underlying the case in the District Court is necessary.

James J. Krajewski, Judge of the Lake County Court, Division III, found it necessary to terminate the employment of three public defenders to clean up the court, to respond to the public, to restore respect for the court and for court processes, and to clean out the "old guard" in that court. One of the public defenders was Fisher. The prior judge and his chief public defender had been indicted and convicted in federal court for actions relating to "scams" involving the court. Judge Krajewski was appointed by the Governor of Indiana to replace the convicted former judge.

Fisher, a Democrat, alleged that the termination of employ-

ment was because of his political affiliation. Judge Krajewski is a Republican.

During the course of this litigation Fisher was given the opportunity to return to employment with Judge Krajewski's court. On his first day back Fisher was late and a letter of reprimand was given him. Later the same morning he and another public defender decided to trade assignments without prior approval of Judge Krajewski as required in written rules of conduct for the public defenders. A brief suspension was imposed. Fisher thereupon determined that he had been "constructively discharged" in retaliation for having filed the action in federal court.

The jury determined that Fisher was not discharged from his employment as a result of his political affiliation and that the discipline imposed upon his brief return to the court was not the result of retaliation and that he was not constructively discharged.

Turning to the facts that are relevant to the issue that this Court has directed Respondent to address, Fisher and his counsel initiated an appeal to the Seventh Circuit but failed or refused to follow the applicable Federal Rules of Appellate Procedure.

Specifically, Fisher and his counsel did not order the transcript. They did not take any of the steps set forth in Rule 10(b), Federal Rules of Appellate Procedure mandated when the entire transcript is not to be ordered, such as notifying opposing counsel, filing a statement of the issues, or seeking to have an agreed statement of the pertinent facts.

In the Seventh Circuit the next step taken by Fisher after the filing of the notice of appeal was to file his brief. In the brief Fisher asserted events had occurred that the transcript, ordered by Judge Krajewski, showed not to have occurred, as set forth in more detail in the argument section of this response.

The brief filed in the Seventh Circuit by Judge Krajewski, delayed because of the necessity for securing the transcript, asserted as the first issue that the appeal should be dismissed for failure of Fisher to secure and file the transcript. Fisher filed two motions for enlargement of time within which to file his reply brief, but the second motion was denied for failure to comply with the Rules.

Oral argument was held in the Seventh Circuit, during which one issue addressed by the Court, through its questioning, was the failure to file the transcript.

In its published opinion the Seventh Circuit taxed in favor of Judge Krajewski the cost (single and not double) of the transcript, sanctioned Fisher and his counsel a total of $1500.00 and referred the case to the Indiana Supreme Court Disciplinary Commission.

SUMMARY OF THE ARGUMENT

The egregious actions of Fisher and his counsel in prosecuting the appeal in this case warranted the sanction imposed. Failure to follow applicable rules of court is properly subject to sanction by the court in front of which the failure occurs. The decision of the Seventh Circuit is in keeping with the decisions of other courts of appeal and is authorized under the Federal Rules of Appellate Procedure. In the appeal not only was the transcript not filed but the proceedings before the District Court were misrepresented.

The request for appropriate sanctions was made in the brief of the appellee in the Seventh Circuit, the filing of which preceded the oral argument at which Fisher and both of his counsel were present, and therefore he was given notice and an opportunity to respond.

REASONS FOR DISALLOWANCE OF THE WRIT

This case does not present a sufficient or reasonable basis for review of the actions of the Seventh Circuit. The actions of

Fisher and his counsel in not only refusing to file the transcript but in misstating the record and misrepresenting facts warranted at least the rather mild sanction imposed.

Contrary to their assertion, there is no divergence of practice between the Circuits, and they have failed to cite a single case from this Court that is at odds with the decision of the Seventh Circuit.

Before further addressing the reasons why the petition should be denied, mention is be made of the waiver of the right to respond to the petition as contained in a letter to the Clerk of this Court.

In that letter it was stated that the right to respond was being waived as to the first issue in the petition because the matter was one between the courts on one hand and Fisher and his counsel on the other, and is not a point of contention (strictly speaking) as between Fisher and Judge Krajewski.

It is still felt that this is true, and this response is made for two reasons. First because this Court requested it. Judge Krajewski and his counsel herein have no problem assisting this Court by providing a response and a more thorough and correct recitation of the events in the Seventh Circuit, and no disrespect for this Court or its request for a response is intended. This relates to the second reason why a response is filed even though the issue does not directly impact either the judgment or its affirmance. As members of the bar Judge Krajewski and his counsel recognize their obligation to assist this and all courts in the administration of justice. This response is filed to fulfill that duty.

Turning to the merits and to the question of whether a writ of certiorari should issue as requested, it should not. No sufficient or proper reason is presented that meets the guidelines of Rule 17.1 of the Rules of this Court.

The failure to file the record cannot be considered in isolation. This lapse is shown to be both inexcuseable and contrary

to the administration of justice when viewed in the context of the issues on the appeal and the true facts, as shown and as can only be shown through the record.

The first issue in the appeal concerned the granting of a motion in limine, made from the bench the morning of trial and not in writing. The only method by which to determine the contours of the ruling and the basis for it is to review the record. Not only did Fisher not provide the Seventh Circuit with the precise terms of the order in limine, he misrepresented the ruling to the Seventh Circuit. He claimed that the ruling precluded the use of prior inconsistent testimony when there is no such ruling in the record. *See* Appendix, p. B-12 & n.6. Had there been such a ruling then the verdict and judgment would likely have been reversed. Judge Krajewski had to file the transcript in order to demonstrate the true facts so that the judgment in his favor would not be reversed.

This was not the only misrepresentation. Two of the issues related to instructions. It needs no citation to authority that an instruction as to which no objection is made cannot be contested on appeal.

Fisher and his counsel claimed not once but twice that objection to the instructions had been made. After a review of the record the Seventh Circuit found that no objection had been made and that any claim of error had thus been waived. There was even a claim that one of the instructions had been the subject of an objection after the magistrate stated, in denying the motion for new trial, that he had reviewed the transcript and that there was no objection. Appendix, p. C-6.

As to the other instruction, containing the forms of verdict, Fisher claimed that he had requested two *sets* of forms, one set relating to the original dismissal and one set relating to the alleged constructive discharge. Again, the record was misstated by Fisher and his counsel and had the transcript not been secured that error and the complete lack of merit in the assertion could not have been properly addressed by the Sev-

enth Circuit.

Fisher claims that a writ of certiorari should be granted because the decision of the Seventh Circuit is in conflict with decisions of other courts of appeal on the same point. He asserts that other circuits have held that bad faith is a prerequisite to the imposition of sanctions and that he was not given proper notice of the possibility of sanctions. He is not correct on either point.

The decision to impose sanctions for failure to file the transcript or to follow the alternatives in Rule 10(b), Federal Rules of Appellate Procedure, is consistent with decisions of other circuits. In at least three cases in other circuits dismissal of the appeal for failure to file the transcript has been imposed. *Abood v. Block*, 752 F.2d 548 (11th Cir. 1985); *Thomas v. Computax Corporation*, 631 F.2d 139 (9th Cir. 1980); and, *Brattrud v. Town of Exline*, 628 F.2d 1098 (8th Cir. 1980). Similar results were authorized in *Gulf Water Benefaction Co. v. Public Utility Commission*, 674 F.2d 462 (5th Cir. 1982) and *United States v. One Motor Yacht Named Mercury*, 527 F.2d 1112 (1st Cir. 1975), relied upon by the Seventh Circuit, although the appeal in *Gulf Water* was not dismissed on the facts of the case.

It is true that none of these relied solely upon the federal rule, but the existence of a local rule to enforce the federal rule is hardly dispositive. It is also true that none of these imposed the particular sanction imposed in this case, but that is not dispositive, either. Sanctions must be tailored to the case, and they are appropriate in this case.

Other circuits have imposed sanctions for other but similar failures to follow the Federal Rules of Appellate Procedure.

In *In re Hanson*, 572 F.2d 192, 193 (9th Cir. 1977), the Court sanctioned the attorney $500.00 and suspended from practice before that court for failure to file the record and failure to file a brief. Indeed, in the middle to late 1970's that Circuit imposed sanctions in numerous reported cases for failure to file a brief.

In *United States v. Potamkin Cadillac Corp.*, 689 F.2d 379 (2d Cir. 1982), at pages 381-82, the court imposed sanctions because the appeal was

> totally lacking in merit, framed with no supporting authority, conclusory in nature, and utterly unsupported by the evidence.

The same can be said of the present case, at least as to those issues that would never have been urged upon a correct statement of the record, which would follow from securing and reading the transcript.

In *In re Tatum*, 587 F.2d 633, 684 (5th Cir. 1979), the court imposed the sanction of suspension from practice for six months for failure to file a brief.

In *In re Tranakos*, 639 F.2d 492, 493 (9th Cir. 1981), the Court suspended an attorney indefinitely until he could

> demonstrate to [the Ninth Circuit] that he is knowledgeable regarding the Federal Rules of Civil Procedure and the rules of [that] court.

In addition to the suspension, he was sanctioned in the amount of $500.00.

In *United States v. Bush*, 797 F.2d 536 (7th Cir. 1986), counsel was sanctioned $500.00 for failure to file a brief in a criminal matter.

In *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538 (9th Cir. 1988), at page 1548, the Court imposed sanctions of $1000.00 for failure to comply with Rule 28(a)(3), Federal Rules of Appellate Procedure and the parallel rule of the Ninth Circuit by not making specific references to the record on appeal. Fisher and his counsel did not, for obvious reasons, cite to the pages of the transcript in this appeal, either.

In *Olympia Company, Inc. v. Celotex Corp.*, 771 F.2d 888 (5th Cir. 1985), at page 893, the court imposed sanctions on

counsel for submitting a brief that made no attempt to address the elements requisite to obtaining reversal and which contained irrelevant citations to the record.

These cases show that other courts are imposing like sanctions for failure to follow the Federal Rules of Appellate Procedure, although none, it is conceded, cites as its sole basis a failure to comply with Rule 10. Non-compliance with Rule 10 was part of the basis in *In re Hanson* and lack of familiarity with rules (which can be inferred in this case) was the basis for the imposition of sanctions in *In re Tranakos*. Thus, contrary to what Fisher would like this Court to conclude, other circuits do, when appropriate, impose sanctions for failure to comply with the Federal Rules of Appellate Procedure.

Fisher claims that in other circuits a finding of bad faith is required before sanctions will be imposed. None of the above cases says anything about bad faith. Further, sanctions on counsel have long been imposed in other contexts without a finding of bad faith, such as appearing late or failing to appear for scheduled court appearances.

The Ninth Circuit has specifically rejected "bad faith" as a prerequisite to the imposition of sanctions. In imposing a suspension from practice for two months, that court stated:

> It is not required that the court find intentional conduct in order for an attorney to be disciplined pursuant to Rule 46(c). Lack of diligence which impairs the deliberations of the court is sufficient.

DCD Programs, Ltd. v. Leighton, 846 F.2d 526, 528 (9th Cir. 1988). While sanctions in this case do not find as their basis Rule 46(c), this language shows that other circuits do not, as Fisher claims, require a finding of bad faith before imposing sanctions. As in this case, the misrepresentation in *DCD Programs* went to the heart of the appellate issue.

The Ninth Circuit had earlier imposed sanctions in a similar matter based upon a conclusion that the attorney's conduct was

"negligent". *In re Disciplinary Action Curl*, 803 F.2d 1004 (9th Cir. 1982).

The Tenth Circuit has also rejected the proposition that a finding of bad faith must be made and must be explicitly stated. Actions similar to those in this case were found to warrant sanctions. The sanctioned party made references to the record that were contrary to what the record in fact showed, and the court found that this shows that counsel is either:

> cavalier in regard to his approach to this case or bent upon misleading the court. In either event, his lack of good faith is manifest.

Herzfeld & Stern v. Blair, 769 F.2d 645, 647 (10th Cir. 1985). That same cavalier approach to this case also manifests a lack of good faith and the Seventh Circuit was warranted in imposing sanctions.

The District of Columbia Circuit likewise has rejected as a prerequisite a finding of bad faith before imposing sanctions on appeal.

> [S]ubjective bad faith is not necessary; attorneys have been held accountable for decisions that reflect indifference to the merits of a claim.

Reliance Insurance Co. v. Sweeney Corp., Maryland, 792 F.2d 1137, 1138 (D.C. Cir. 1986). Sanctions of $5220.00 in attorney fees to the opposing party were imposed. The court in that case premised its sanctions on 28 U.S.C. §1927 and observed that "deliberate" conduct was necessary. Deliberate conduct in the refusal to order a transcript is present in this case.

Even if a finding of bad faith were a prerequisite to the imposition of sanctions for violations of the Federal Rules of Appellate Procedure, bad faith in this case can be inferred from the making of factual claims contrary to the record.

Fisher also claims that there was no showing of prejudice to Judge Krajewski as appellee. This is incorrect. It is not only

the appellant but also the appellee who has a right to a considered opinion on appeal, an opinion based upon the facts. Indeed, the appellee as the prevailing party has perhaps a greater interest in seeing that a proper decision is reached on appeal since it is a decision in favor of the appellee that is being assailed. Faced with an inadequate record and misrepresentations of facts, the appellee must take actions that the rules require of the appellant, as occurred in this case. It cannot seriously be claimed that Judge Krajewski was not prejudiced by the false claims in the brief submitted by Fisher. If certain of the facts had been true, a reversal might have occurred. To preserve his judgment and to demonstrate just how egregious was the conduct of Fisher and his counsel, Judge Krajewski had to secure the transcript, delaying the appeal. It almost does not need to be mentioned that in these times of soaring numbers of cases on the federal dockets the Seventh Circuit was also prejudiced in its ability to dispense justice speedily by being unnecessarily diverted from the merits to procedural issues. As stated above, this issue is really one between the Seventh Circuit and Fisher and his counsel, and therefore the prejudice to the courts should not be overlooked.

The purpose of sanctions cannot be forgotten. As explained in *Moultron v. Commissioner of Internal Revenue*, 733 F.2d 734 (10th Cir. 1984), courts have:

> the inherent power to impose a variety of sanctions in order to regulate our docket, promote judicial efficiency, and deter frivolous filings.

This appeal was frivolous to the extent that failure to secure the record made for three issues (motion in limine, instruction, and verdict forms) when there was absolutely no basis in the record. Such frivolous filings do in fact clog the docket, divert time that is needed to consider meritorious issues, and undermine judicial efficiency. The three issues as to which the record was misrepresented should never have taken the time of the Court.

> Penalizing this waste of appellate resources, as much as compensation for damages suffered by prevailing parties, is the justification for sanctions.

Coghlan v. Starkey, 852 F.2d 806, 815 (5th Cir. 1988) (which is surely the lengthiest and most comprehensive discussion of sanctions in the federal courts, citing virtually every case on the point).

Fisher attempts to assail the Seventh Circuit in his petition, alleging that it has issued a disproportionate number of sanctions since 1986 when compared to other circuits. He does not analyze the figures he asserts or cite to the cases that form the basis for his implicit conclusion that the Seventh Circuit is "sanction-happy", so no sufficient response can be made. Maybe the Seventh Circuit, concerned about the quality of representation before it, is reporting more cases than the other circuits. The bare numbers do not indicate anything about the quality of the decisions. In some cases there are sanctions imposed for failure to file a brief, to the detriment of criminal defendants who languish in custody. *See, e.g., United States v. Dominguez*, 810 F.2d 128 (7th Cir. 1987); and *United States v. Stillwell*, 810 F.2d 135 (7th Cir. 1987). In both cases counsel was sanctioned with a fine and the matter was referred to the appropriate state disciplinary authority.

The decision of the Seventh Circuit in imposing sanctions for failure to file the transcript is not, under the facts of this case including the misrepresentations of the record, contrary to or beyond the decisions of other courts, and as to this aspect of the petition it should be denied.

The second aspect of the petition concerns notice and an opportunity to respond to the possibility that sanctions will be imposed.

It is true that there was no order to show cause issued and no specific notice from the Seventh Circuit that sanctions might be imposed against Fisher or against his counsel.

However, both Fisher and his counsel were "on notice". The first issue in the brief submitted by Judge Krajewski was as follows:

> This appeal should be dismissed for failure of the Plaintiff-Appellant to follow the Federal Rules of Appellate Procedure.

Brief of Defendant-Appellee Krajewski, page 13. This is the requisite notice.

Other circuits have found that either a motion for sanctions or a request in a brief constitutes notice. *Toepfer v. Department of Transportation*, 792 F.2d 1102 (Fed. Cir. 1986); *Adamsons v. Wharton*, 771 F.2d 41, 43-44 & n.4 (2d Cir. 1985); *In re Universal Minerals, Inc.*, 755 F.2d 309 (3rd Cir. 1985).

As stated earlier, the request for sanctions was made in the brief submitted by Judge Krajewski, although the sanction requested in that brief was dismissal of the appeal. The Seventh Circuit declined to impose that sanction, preferring to affirm on the merits, but did impose sanctions well within its rights and which are comparable to those imposed in other circuits for similar conduct.

Following the filing of Judge Krajewski's brief, Fisher had the opportunity to file a reply brief. He sought and was granted an enlargement of the time within which to file. As that time was about to expire he filed a second request for an enlargement, which was denied as not in compliance with the applicable rules. Thus, Fisher and his counsel were on notice that sanctions were sought and had the opportunity to respond in writing.

Oral argument was held. One of the issues addressed during the argument was the failure to file the record and the possibility of imposing sanctions. Fisher presented at oral argument only lame excuses for the dereliction of duty. They continued to assert that the appeal could be decided without the transcript, but the court needed the transcript to discover

the true facts. They contended, as they did in their brief, that the transcript could not be afforded. That does not vitiate their responsibility since permission to proceed in forma pauperis could have been sought. It further appears to be contrary to the facts, since after the imposition of sanctions Fisher was able to promptly locate the $1296.00 that the transcript cost, pay that amount to the District Court clerk even before costs were taxed, and attach the receipt as an exhibit to their petition for rehearing.

Fisher clearly had an opportunity to respond to the requests for sanctions and attempted to do so. That he did not succeed does not show that he was denied due process but merely that he did not obtain the desired result.

Fisher and his counsel also appear to be complaining because this matter was referred to the Indiana Supreme Court Disciplinary Commission. That is quite proper. Any member of the bar (and there is no exclusion for judges) who is aware of circumstances indicating that an attorney may not be fit to practice law has a duty to report that information. At least one member of the panel deciding this case — Judge Manion — is a member of the bar in Indiana. Further, this practice is consistent with cases in other circuits. *See McGoldrick Oil Co. v. Campbell, Athey & Zukowski*, 793 F.2d 649, 654 (5th Cir. 1986). There is no split among the circuits on this point.

The petition should be denied for the reason that Fisher and his counsel have failed to present cogent argument that the decision of the Seventh Circuit is inconsistent with decisions of other circuits on the same point or that it is not consistent with controlling authority from this Court. There is no basis upon which to grant the requested writ and the petition should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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NO. 89-513

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

LLOYD B. FISHER,

Petitioner,

v.

JUDGE JAMES J. KRAJEWSKI,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

1. Whether the Seventh Circuit Court of Appeals incorrectly relied upon F.R.A.P. 3(a) in stating its belief that it was appropriate to impose sanctions against Appellant and his counsel for their failure to strictly follow F.R.A.P. 10(b) and publicly reprimanding them by specifically naming them in the body of the Opinion and referring this case to the Indiana Disciplinary Board, without prior notice, and without a finding of bad faith, or a showing of prejudice to the Appellee in contravention of the law of other circuits and this Court.

TABLE OF CONTENTS

A. Respondent's Brief In Opposition fails to adequately respond to Question No. 1 of Petitioner's Petition. A substantial portion of the Brief focuses on matters only relevant to Question No. 2. Respondent totally fails to mention FRAP 3(a), the rule relied upon by the Seventh Circuit in stating its belief that it was appropriate to impose sanctions on the Appellant and his attorneys of record. Respondent fails to state one reason why FRAP 46(c) should not apply in this case and why Petitioner should not be given prior notice and an opportunity to show

TABLE OF AUTHORITIES

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I.

OPINIONS BELOW

Petitiioner accepts the statement as presented in Respondent's Brief In Opposition.

II.

JURISDICTION

Petitioner relies upon the statement in his Petition For Writ of Certiorari.

III.

STATEMENT OF THE CASE

A. Nature of the Case

Contrary to Respondent's assertion, "the precise issue" . . . did not arise "from the opinion of the Seventh Circuit in which that court found that Fisher and his counsel had violated the Federal Rules of Appellate Procedure and imposed sanctions upon both Fisher and his his counsel."

The Seventh Circuit specifically held:

> **Furthermore, we believe that it is appropriate, pursuant to Fed.**

App. P. 3(a), to impose sanctions in the total amount of $1,500.00 to be borne in equal measure by the plaintiff/appellant Attorney Lloyd B. Fisher and each of his attorneys of record on appeal, Gilbert King, Jr. and Macarthur Drake, for their failure to submit any part of the transcript of the lower court proceedings; failure to file a certification showing that they did not intend to do so; failure to notify the Appellee of their intention not to file the transcript, all in violation of Fed. R. App. P. 10(b). In addition, we refer this case to the Indiana Disciplinary Board for investigation, review and any action they deem appropriate under the circumstances.

B. Course of Proceedings Below

Petitioner relies upon the statement in his Petition For Writ of Certiorari under the heading "Statement of the Case." Further, the Petitioner would state that while it is true that he did not file a transcript of the proceedings, he did file a three hundred and sixty-two (362) page Appendix in which he referred to in presentiang his argument to the Seventh

Circuit.

Petitioner accepts the statement of the Respondent except as to the specific holding of the Seventh Circuit which is mentioned herein in the previous section.

IV.

Statement of the Material Facts

Contrary to Respondent's assertions of "facts underlying the case in the District Court," there was no finding in the District Court or the Seventh Circuit relative to the Respondent's reasons for terminating the three Public Defenders, one of which was the Petitioner herein, nor were there any findings relative to any scams involving the Respondent's predecessor and the court. More importantly, not only were there no findings, but there was no evidence presented which tied the Petitioner to any of these assertions.

There was no finding by the District Court or the Seventh Circuit that the Petitioner was late, as asserted by the Respondent.

REASONS FOR GRANTING THE WRIT

V.

SUMMARY OF THE ARGUMENT

A. Respondent's Brief In Opposition fails to adequately respond to Question No. 1 of Petitioner's Petition. A substantial portion of the Brief focuses on matters only relevant to Question No. 2. Respondent totally fails to mention FRAP 3(a), the rule relied upon by the Seventh Circuit in stating its belief that it was appropriate to impose sanctions on the Appellant and his attorneys of record. Respondent fails to state one reason why FRAP 46(c) should not apply in this case and why Petitioner should not be given prior notice and an opportunity to show

cause why sanctions should not be imposed.

B. For all the reasons stated in Petitioner's Petition For Writ of Certiorari, we urge this Court to issue a writ.

VI.

ARGUMENT

A.

Initially, it is important to point out that the Respondent in his Brief in Opposition to the Petition For Writ of Certiorari virtually ignores the issue that he was required to address. He has completely failed to mention FRAP 3a which the Seventh Circuit relied upon in its opinion in suggesting that the imposition of sanctions was appropriate. Secondly, he contends that Petitioner made misrepresentations of the record, yet he fails to point to any place in the opinion wherein the Seventh Circuit made such a

finding. Thirdly, he spends a significant amount of time addressing the second issue in Petitioner's Writ, virtually ignoring the request to respond to Question 1. Fourthly, he ignores the Seventh Circuit's failure to utilize the provision of FRAP 46c which by its terms is specifically designed to deal with "conduct unbecoming a member of the Bar" or "for failure to comply with the rules of appellate procedure." Fifthly, the Respondent, in his Brief In Opposition, concedes that there is no precedent for the precise sanction for the specific rule violation in this case, which, in itself, provides another reason why a writ should issue in this case.

The litany of cases cited by the Respondent from other circuits that have imposed sanctions "for other, but similar, failures to follow the Federal Rules of

Appellate Procedure" are both factually and legally distinguishable and therefore not dispositive of the precise issue before this court.

For example, some of the cases dealt with failure to file a brief or submitting a brief that made no attempt to address the elements requisite to obtain reversal. See In re: Hanson, 572 F2d 192, 193 (9th Cir. 1977); United States v. Buck, 797 F2d 536 (7th Cir. 1986); In re Tatum, 587 F2d 683, 684, (5th Cir. 1979); Olympia Company, Inc. v. Celotex Corp., 771 F2d 888 (5th Cir. 1985). A brief was filed in this case and there was no findings by the Seventh Circuit that the brief failed to address the elements requisite to obtain reversal.

In other cases cited by Respondent, sanctions were imposed because of a specific factual finding, dissimilar to the case at bar. For example, the attorney's

conduct was negligent; See In re Disciplinary Action Curl, 803 F2d 1004 (9th Cir. 1982); or that there was a cavalier approach to the case. See Herzfeld & Stern v. Blair, 769 F2d 645, 647.

The Respondent, at page 11 of his Brief, cites Insurance Company v. Sweeney Corp., Maryland, 792 F2d 1137 for the proposition that a finding of bad faith is not a prerequisite before imposing sanctions which in that case was premised on 28 USC Section 1927. That argument completely ignores the fact that in that case the court found the appeal to be frivolous and that the party had demonstrated a reckless indifference to the merits of his claim. There was no such finding in this case. Moreover, the Seventh Circuit did not find that the Respondent was prejudice by any acts of the Petitioner. In fact, the Respondent

requested additional time to file his Brief and requested a copy of the transcript. The court granted him the additional time.

Contrary to Respondent's assertions, the court did not find that there had been a misrepresentation of the record or that, in oral argument, Petitioner's reasons for not filing the transcript were "lame excuses for his dereliction of duty."

Moreover, at least in the Fifth Circuit, a failure to comply with FRAP 10(b) may be considered a "minor infraction of the rules." See Gulf Water Benefaction Co. v. Public Utility Comm'n, 674 F2d 462, 466 (5th Cir. 1982), which indicates as follows:

> The court finds that the failure to provide a complete record on appeal is not jurisdictionally fatal . . .
>
> . . . .
>
> The court is also mindful that the drastic sanction of dismissal

> should not be imposed for minor infraction of the rules. 9 Moore's Federal Practice, 9I 210.05 [1] at 10-26 N.16.

Petitioner is not advocating that a failure to comply with FRAP 10(b) is a minor infraction. This quote is for illustrative purposes only. However, we must note that, after thorough research, we can find no reported case in which the specific sanctions imposed in this case were levied for a violation of FRAP 10(b).

Respondent at pg. 14 of his Brief cites Toepfer v. Dept. of Transportation, 792 F2d 1102, [Fed. Cir. 1986]; Adamsons v. Wharton, 771 F2d 41, 43 -44 n. 4 [2nd Cir. 1985]; In re; Universal Minerals, Inc., 755 F2d 309 [3rd Cir. 1985] for the proposition that a motion for sanctions or a request in a brief constitutes notice. First, these cases are factually distinguishable from the case at bar. In

Toepfer and Adamsons, supra, there was a finding that the appeal was frivolous. In Universal Minerals, Inc., supra, the sanctioned attorney refused to respond to repeated requests of the court to address certain jurisdictional issues. Secondly, none of these cases stand for the proposition asserted by the Respondent.

The literal reading of FRAP 46(c) clearly provides for disciplinary power by the Court of Appeals over attorneys who practice in their courts. It specifically provides:

> "(c) Disciplinary Power of the Court Over Attorneys. A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, takey any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court."

In this case, the Petitioner and his counsel of record were not given reasonable notice and an opportunity to show cause why sanctions should not be imposed. More importantly, there was no finding by the court that the appeal was frivolous, lacked merit or was vexatious. Thus a summary imposition of sanctions of the character levied in this case was not warranted.

ARGUMENT

B.

For all the reasons stated in Petitioner's Petition For Writ of Certiorari, we urge the court to issue a writ. Moreover, the Respondent has totally failed to demonstrate either legally or factually why a writ should not issue.

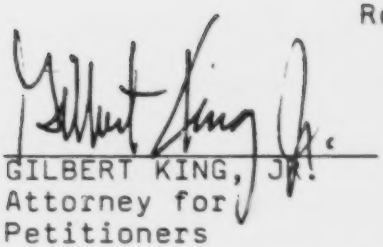
VII.

CONCLUSION

For all the foregoing reasons, and because this case apparently is one of

first impression, we respectfully urge this Court to grant a writ of certiorari in order to clarify the standards for the imposition of sanctions for a violation of the appellate rules.

Respectfully submitted,



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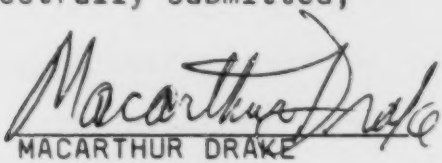

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